

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JUAN NEVADO, 10835-055,

Petitioner,

-v-

UNITED STATES OF AMERICA,

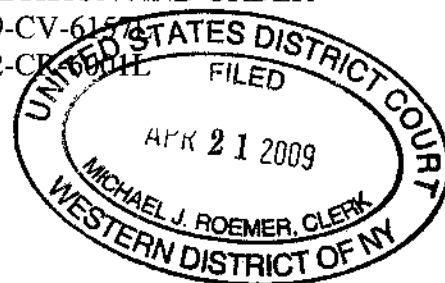
Respondent.

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DECISION AND ORDER

09-CV-6157-L

02-CR-6001-L



Petitioner, Juan Nevado, acting *pro se*, has filed what he considers to be a “motion for reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure” in an attempt to move the Court to provide him relief that had been denied pursuant to 28 U.S.C. § 2255. He argues that such a motion is not a “second or successive” petition.<sup>1</sup>

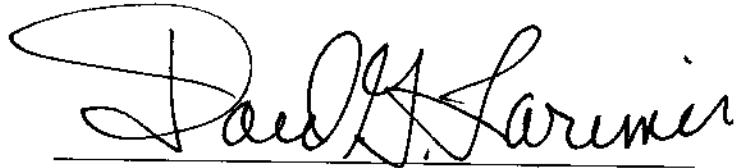
Rule 60(b) motions are available in civil habeas proceedings, but “only when the Rule 60(b) motion attacks the integrity of the habeas proceeding and not the underlying criminal conviction.” *Harris v. United States*, 367 F.3d 74, 77 (2004); *see also Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (holding that a Rule 60(b) motion may be appropriate if there is “some defect in the integrity of the federal habeas proceedings”). Here, petitioner is not challenging a judgment in a habeas or § 2255 proceeding. Rather, he is seeking to be resentenced on the original conviction, and argues that the consecutive sentence was error. Thus, petitioner is challenging the underlying conviction and sentence.

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<sup>1</sup>Because petitioner did not have a pending habeas action, this motion was opened as a motion to vacate pursuant to 28 U.S.C. § 2255. Upon review, it is clear that petitioner intended this to be a Rule 60(b), and the Clerk of the Court is directed to close the Civil Docket Number 09-CV-6157 administratively.

Such relief is not available to petitioner by way of a Rule 60(b) motion, and thus the motion may be considered a successive petition. *Gitten v. U.S.*, 311 F.3d 529, 534 (2d Cir. 2002). Alternatively, the Court may deny the motion as beyond the scope of Rule 60(b). *Id.* Accordingly, the motion is denied. Additionally, the Clerk of the Court is directed to close Civil Docket Number 09-CV-6157.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "David G. Larimer", written over a horizontal line.

DAVID G. LARIMER  
United States District Judge

DATED:

April 21, 2009  
Rochester, New York